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UNPUBLISHED OPINION

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re	)	Bankruptcy Case No. 85C-00545
	)	
ARNOLD FOCH PARKINSON,	)	
	)	
Debtor.	)	MEMORANDUM DECISION

Appearances: R. Mont McDowell, Salt Lake City, Utah, for the debtor; Patrick H. Fenton, Cedar City, Utah, pro se.

This matter came before the Court on November 5, 1985, on the debtor's objection to the proof of claim of Patrick H. Fenton ("Fenton"). Fenton's claim is based primarily on a prepetition stipulation for settlement of a state court lawsuit. This Court determined that the stipulation constituted an executory contract. In conjunction with his objection to Fenton's claim, the debtor filed a pleading entitled, "Rejection of Executory Contract." Fenton responded by filing a pleading entitled, "Motion to Set Aside Rejection of Executory Contract and for Court to Order Same."

This Court is called upon to determine whether and to what extent the claim of Fenton shall be allowed and whether the debtor's rejection of the executory contract should be approved.

FACTUAL BACKGROUND

The debtor filed his petition for voluntary relief under Chapter 11 on February 21, 1985. On April 9, 1985, the debtor filed a motion for authority to assume a lease agreement dated March 9, 1977, between Fenton as lessor and the debtor as lessee. A hearing on that motion was held on April 17, 1985, at which the amount in default under the lease was determined to be $27,437.00. The Court ruled that Fenton had adequate assurance of debtor's future performance and ordered the debtor to cure the default within 45 days. Fenton has been paid the default amount.

On August 28, 1985, Fenton filed a pleading entitled "Motions and Notice of Hearing", seeking to have the prepetition stipulation entered into on January 24, 1985 in the state court action determined to be a "valid and binding stipulation and judgment" on all parties, or, in the alternative, to compel assumption or rejection of the stipulation as an executory contract. The stipulation in question was executed in settlement of a lawsuit initiated in the Fifth Judicial District Court for Iron County, Utah, bearing civil nos. 9925 and 10398. Parties to the stipulation are the debtor, Fenton and one Dana Pankey.

At the hearing on Fenton's "motions" on September 24, 1985, the parties represented that a settlement agreement had been negotiated. An order incorporating that agreement was entered by

this Court on October 14, 1985. The order states that the stipulation of January 24, 1985 constitutes a valid and binding executory contract,[1] that the debtor shall have 30 days from the date of the hearing (September 24, 1985) within which to assume or reject that executory contract, and that Fenton and Pankey shall have 30 days from the date of the hearing within which to file amended proofs of claims.[2]

The debtor filed his objection to the claim of Fenton on September 11, 1985, prior to the hearing at which the stipulation was determined to be an executory contract. On November 4, 1985, the debtor filed the "rejection" of the executory contract. The purported rejection was filed beyond the 30 days set forth in the order of October 14, 1985.

At the November 5, 1985 hearing on debtor's objection to Fenton's claim the debtor was sworn and testified concerning the validity of the amounts claimed by Fenton. Fenton, although

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1 See, e.g., Jenson v. Continental Financial Corp., 591 F.2d 477, 481-82 (8th Cir. 1979) (settlement agreement in class action was an executory contract); In re Kiki, Ltd., 35 B.R. 175, 177 (Bkrtcy. D. Haw. 1983) (compromise and settlement agreement constituted executory contract); Matter of Castriota, 35 B.R. 160, 162-63 (Bkrtcy. N.D. Ga. 1983) (divorce settlement agreement was an executory contract). Cf. Draper v. Draper, 790 F.2d 52, 54 (8th Cir. 1986) (even if divorce settlement agreement is an executory contract, provisions thereof are nondischargeable obligations because they are support payments).

2 The debtor has entered into a stipulation with Dana Pankey resolving the nature and extent of the claim which Pankey will be allowed.

present, did not testify, but relied on his proof of claim and upon the executory contract as being determinative of the amount allowable.

On November 8, 1985, Fenton filed a motion seeking to set aside the rejection of executory contract filed by the debtor on November 4, 1985, alleging that the rejection was filed in bad faith and was not timely. Fenton neither requested oral argument on the matter nor scheduled a hearing before the Court as required by Local Rule 5. Inasmuch as Fenton's motion is part and parcel of the claim allowance dispute presently before the Court, the Court shall proceed to determine the issues raised by that motion in its decision.

DISCUSSION

A. Rejection of Executory Contract.

A debtor in possession, exercising the powers of a trustee conferred by § 365 of the Bankruptcy Code, may assume or reject an executory contract, subject to the court's approval. 11 U.S.C. § 365(a). See In re Kelly Lyn Franchise Co., 26 B.R. 441, 445 (Bkrtcy. M.D. Tenn.), aff'd, 33 B.R. 112 (M.D. Tenn. 1983); In re Summit Land Co., 13 B.R. 310, 315, 7 B.C.D. 1361, Bankr.L.Rep. (CCH) ¶ 68,345, 4 C.B.C.2d 1431 (Bkrtcy. D. Utah 1981). Until such time as the court specifically allows a debtor in possession to reject a contract, it continues to be effective

and enforceable between the parties. See In re Tirenational Corp., 47 B.R. 647, 651, 12 B.C.D. 1224 (Bkrtcy. N.D. Ohio 1985); Matter of Computerized Steel Fabricators, Inc., 40 B.R. 344, 348, 12 B.C.D. 72 (Bkrtcy. S.D. N.Y. 1984); Central Control Alarm Corp. v. Black (Matter of Central Watch, Inc.), 22 B.R. 561, 565, 9 B.C.D. 523 (Bkrtcy. E.D. Wis. 1982).

Pursuant to this Court's order of October 14, 1985, the debtor was to have assumed or rejected the executory contract within 30 days of the date of hearing. On November 4, 1985, the debtor filed its "rejection" of the executory contract. The Bankruptcy Rules contemplate that a proceeding to reject an executory contract be initiated by motion, not by notice as was done here. See Bankruptcy Rules 6006(a) and 9014. Fenton has not objected to this pleading irregularity but, rather, insists that because the executory contract was not rejected within the time fixed by the Court, it was filed in bad faith and must be assumed. Fenton cites no authority in support of this novel contention.

The purpose for requiring assumption or rejection within a time certain was to expedite resolution of the rights and duties of the parties, not to saddle the debtor with an obligation which is unduly burdensome to the estate. Moreover, inaction by a trustee or debtor in possession is most frequently construed as rejection of an executory contract, not as grounds for compelling

assumption. See In re Kiki, Ltd., 35 B.R. at 177 (compromise and settlement agreement deemed rejected by trustee because not assumed within 10 days following trustee's qualification); In re By-Rite Distributing, Inc., 47 B.R. 660, 669-70, notes 12 and 13, 12 B.C.D. 1082, Bankr.L.Rep. (CCH) ¶ 70,320, 12 C.B.C.2d 253, (Bkrtcy. D. Utah), rev'd on other grounds, 55 B.R. 740, Bankr.L.Rep. (CCH) ¶ 70,971, 14 C.B.C.2d 460 (D. Utah 1985).

In deciding whether approval of the rejection of an executory contract should be given, three standards have emerged. The most widely accepted is the "business judgment" standard, which looks to whether creditors of the estate will benefit by rejection. See In re Chi-Feng-Huang, 23 B.R. 798, 800-01, 9 B.C.D. 972, 7 C.B.C.2d 639 (Bkrtcy. App. Pan. 9th Cir. 1982); In re Meehan, 46 B.R. 96, 100-01, 12 B.C.D. 799, 12 C.B.C.2d 113 (Bkrtcy. E.D. N.Y. 1985); In re Norquist, 43 B.R. 224, 230, 11 C.B.C.2d 1146 (Bkrtcy. D. Wash. 1984); In re Parrot Packing Co., Inc., 42 B.R. 323, 331, Bankr.L.Rep. (CCH) ¶ 69,372, 9 C.B.C.2d 877 (Bkrtcy. D. Ind. 1983); In re Stable News Associates, 41 B.R. 594, 596, Bankr.L.Rep. (CCH) ¶ 69,940, 11 C.B.C.2d 20 (Bkrtcy. S.D. N.Y. 1984).

The second standard, the "matter of course" test, requires court approval of rejection as a matter of course except in extraordinary situations. In re Summit Land Co., 13 B.R. 310,

314-15 (Bkrtcy. D. Utah 1981). Cf. In re Alexander, 670 F.2d 885, 8 B.C.D. 1325, 6 C.B.C.2d 771 (9th Cir. 1982).

The least accepted standard, the "burdensome" test, necessitates a showing that the contract is onerous and burdensome to the estate, and requires the court to balance the equities of rejection and its effect on the debtor and the non-debtor party to the contract. Under the "burdensome" test, an executory contract could not be rejected as long as the contract provided the estate with some benefit. See In re Meehan, 46 B.R. at 100; In re Petur U.S.A. Instrument Co., Inc., 35 B.R. 561, 563, 9 C.B.C.2d 1363 (Bkrtcy. W.D. Wash. 1983); In re Hurricane Elkhorn Coal Corp. II, 15 B.R. 987, 989 & n. 3 (Bkrtcy. W.D. Ky. 1981).

Under any of these standards, it clearly appears to this Court that rejection of this executory contract is justified and should be approved. Having reviewed the stipulation, it is this Court's view that the claims of Fenton addressed by the stipulation all relate to the lease agreement which previously was assumed and cured by the debtor. The motion of Fenton to compel assumption of the stipulation appears to be a labored attempt to exact additional sums from the debtor under the lease agreement after this Court has made a determination as to the default amount owing.

B. Debtor's Objection to Fenton's Claim.

With respect to Fenton's claim in the amount of $48,257.50, Fenton's position is that the stipulation executed on January 24, 1985, binds the debtor as to the amount which may be allowed in the event that the stipulation, as an executory contract, is rejected by the debtor. For the reasons stated below, the Court does not find this argument persuasive.

Section 502 of the Code governs the allowance or disallowance of claims. Subsection (g) gives entities injured by the rejection of an executory contract a prepetition claim for any resulting damages and requires that the injured entity be treated as a prepetition creditor with respect to that claim. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 354 (1977), reprinted in 1978 U.S. Code Cong. & Admin. News, p. 6310.

Nowhere in the record is there any indication that the debtor has waived his right to dispute the amount of Fenton's claim. At the hearing on November 5, 1985, the debtor appeared and testified as to the validity of the claim asserted by Fenton. See Transcript of Hearing, pp. 8-12. The substance of the debtor's testimony, which was unrefuted by Fenton, was that the amounts claimed by Fenton were totally unfounded and should be disallowed.

Fenton's proof of claim, filed on July 5, 1985, indicates a total claim of $75,694.50, reduced by $27,437.00, representing

the lease default amount previously determined by this Court and paid by the debtor.

Fenton relies entirely on the stipulation and upon his proof of claim to establish the amount allowable. Further, Fenton claims secured status for his claim, as well as an administrative priority. No authorities were cited nor was any evidence presented to support either contention.

Section 502(b) empowers this Court to determine the amount of Fenton's claim or to disallow the claim in its entirety. A proof of claim executed and filed in accordance with the Bankruptcy Rules is prima facie evidence of the validity and amount of the claim, and the burden is on the debtor to rebut the claimant's prima facie case. See Bankruptcy Rule 3001(f). If the debtor offers sufficient evidence to rebut the claimant's prima facie case, the ultimate burden of persuasion then rests on the claimant. See In re Century Inns, Inc., 59 B.R. 507, 522 (Bkrtcy. S.D. Miss. 1986); In re Wells, 51 B.R. 563, 566-67 (Bkrtcy. D. Colo. 1985); In re Twinton Properties Partnership, 44 B.R. 426, 429 (Bkrtcy. M.D. Tenn. 1984); Matter of Texlon Corp., 28 B.R. 525, 528 (Bkrtcy. S.D. N.Y. 1983).

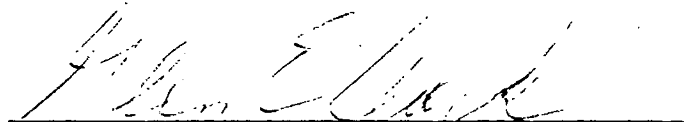
Fenton presented only a proof of claim against the debtor, the prima facie validity of which was rebutted by the debtor's testimony. The only evidence before the Court is the uncontroverted testimony of the debtor that there is no basis for

Fenton's claim. Therefore, the claim of Fenton in the amount of $48,257.50 will be disallowed. The Court further finds that rejection of the stipulation dated January 24, 1985, and previously determined by this Court to be an executory contract, is in the best interest of the estate and will be approved.

Counsel for the debtor shall prepare and submit an appropriate order in accordance with Local Rule 13.

DATED this 3 day of July, 1986.

BY THE COURT:



GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE